IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 279 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.R.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

CHHIOTUBHAI DIVANBHAI VASAVA

Appearance:

1. Criminal Appeal No. 279 of 1997
Mr.B.D.Deai, A.P.P. for appellant.
NOTICE SERVED for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.R.SHAH

Date of decision: 12/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973 is directed against judgment dated January 27, 1997 rendered by the learned Additional Sessions Judge, Bharuch in Sssions Case no.50 of 1996, by which respondents are acquitted of the offences punishale under Sections 8(C), 21, 22, 23 and 29 of the Narcotic Drugs and Pshychotropic Substances Act,1985 ("the Act" for short).

2. Mr. N.V.Kathiriya who was discharging duties as Police Sub Inspector, Task Force, District Bharuch was investigating C.R.no.46/1995 registered for the offences punishable under Sections 8(C), 21, 22, 23, and 29 of the Act. One of the accused arrested with reference to said C.R. was respondent no.2 herein. On interrogation of respondent no.2, PSI Mr.Kathiriya had learnt that respondent no.2 had sold 1 1/2 Kilograms of Ganja to respondent no.2 which was stored by respondent no.1 in his house. Mr.Kathiriya had summoned Gulam Mahmad Ismail Khatri and Ramesh Tadvi to act as Panchwitnesses as well as photographers and a person to weigh the substance if found. After constituting raiding party, the premises belonging to respondent no.1 was searched, and it was claimed by PSI Mr.Kathiriya that in presence of Panchwitnesses, Ganja weighing 200 grams was found from one of the drawers of the table lying in the house of respondent no.1. Mr.Kathiriya had seized and sealed offending substance found allegedly from possession of respondent no.1 and lodged complaint with Prafulsinh Vakatsinh. The samples seized were sent to FSL for analysis. On conclusion of investigation, the respondents were chargesheeted of the offences punishable under the Act in the Court of learned Special Judge, Bharuch where the case was numbered as Sessions Case no.50/1996.

3. The learned Judge had framed necessary charge against the respondents at Exh.3. The charge was readover and explained to the respondents who had pleaded not guilty to the same and claimed to be tried. Therefore, the prosecution, in all, had examined twelve witnesses to prove its case against the respondents. The names of those witnesses are mentioned in paragraph 5 of the judgment. The prosecution had also produced documentary evidence as indicated in paragraph 5 of the judgment. After recording of evidence of prosecution witnesses was over, learned Judge had explained to the respondents, circumstances appearing against them in the

evidence of prosecution witnesses and recorded their further statements as required of Section 313 of the Code of Criminal Procedure, 1973. In their further statements, the case of the respondents was that a false case was foisted on them, but they were innocent. However, none of the respondents had examined any defence witness.

4. After considering the evidence adduced by the prosoecution and hearing the learned Counsels of the parties, the learned Judge held that no reliable evidence was produced to establish that respondent no.2 had sold Ganja to respondent no.1 nor trustworthy evidence was adduced to establish that Ganja was recovered from possession of respondent no.1. In view of abovereferred to conclusions, the learned Judge has acquitted the respondents by judgment dated January 27, 1997, giving rise to the instant appeal.

5. This Court has considered the submissions advanced at the Bar by the learned Counsel of the State of Gujarat as well as reappreciated the whole evidence on record. It is relevant to note that during interrogation of another case, respondent no.2 is alleged to have admitted before PSI Mr.Khatiriya that he had sold Ganja to the respondent no.1. Except this confessional statement made by respondent no.2 in presence of a Police Officer which is hit by the provisions of Section 25 of the Indian Evidence Act, 1872, no evidence was addcued to establish that respondent no.2 had sold Ganja to the respondent no.1. In view of the provisions of Section 25 of the Evidence Act, the prosecution of respondent no.2 was not justified at all. Under the circumstances, the acquittal of respondent no.2 cannot be regarded as erroneous so as to warrant interference of this Court in instant appeal.

6. As far as respondent no.1 is concerned, this Court finds that his acquittal is based on finding that it could not be proved by the prosecution that the offending substance was recovered from his possession. Though Panchwitness Gulam Mahmad Ismail Khatri, PW 1 Exh.7 has turned hostile, he has stated in cross-examination by learned Advocate of respondent no.1 that they were made to sit in a house where police had placed Ganja, and thereafter, they were all photographed. The evidence of witness Rameshbhai Tadvi, PW 2 Exh.12 also does not show that in his presence electricity bill issued in the name of respondent no.1 was recovered. This witness has also admitted in cross examination by the learned Counsel of respondent no.1 that all were made

to sit in a room after which Police Jamadar had placed Ganja, and thereafter, their photographs were taken. The evidence of witness Sanjaykumar Chimanlal PW 4, Exh.16 shows that he had taken six photographs while search of house of respondent no.1 was being conducted, but this witness has not stated that in his presence PSI Mr.Kathiriya had recovered electricity bill which indicated that respondent no.1 was in possession of the house from which offending substance was found. Even witness Prafulsinh Vakatsinh PW 7, Exh.27 who was one of the members of Bharuch Task Force and who had accompanied Mr.Kathiriya during the course of search of house of respondent no.1 also does not say that in his presence electricity bill issued in the name of respondent no.1 was recovered. Under the circumstances, the learned Judge who had advantage of observing demeanor of witnesses has disbelieved Mr.Kathiriya's say that offending substance was found from possession of respondent no.1. The view taken by the learned Judge on evidence adduced by the prosecution cannot be termed as perverse or not warranted on the facts of the case. This is an acquittal appeal, and therefore, the appellate Court would be slow in disturbing findings recorded by the learned Judge who had advantage of observing demeanor of witnesses. Further, it cannot be said that two views are not possible and that the view taken by the learned Judge that the prosecution has failed to establish that the offending article was recovered from possession of respondent no.1 is contrary to the evidence on record. Under the circumstances, the acquittal of respondent no.1 is not liable to be reversed. The discussion made above, makes it clear that the learned Additional P.P. has failed to dislodge the reasons assigned by the learned Judge for acquitting the respondents, and therefore, the appeal will have to be dismissed.

7. For the foregoing reasons, the appeal fails and is dismissed. Muddammal be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

(M.R.Shah,J.)

stanley-jmp.